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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 593

GILBERT H. MILLER and
G. H. MILLER AND COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA and
EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF PETITIONERS

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February 10, 1959

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1. The Government is in error in asserting that the Court below did not rely upon the failure of the petitioners to testify as a basis for reaching its conclusion.

If the Government had made out a case before the Secretary of Agriculture against the petitioners, there would have been no need for any reference to the fact that the petitioners had failed to testify. The sole function of reference to such failure to testify was to fill in this gap in the Government's case. It was not, as the Government suggests, a casual reference but a holding

of the Court below, as is indicated by the repeated reliance on this factor to support its position. Thus, reference to the accuseds' failure to testify is made in the opinion as set out at pp. 2a, 3a, 5a, and 6a of the Appendix to our petition, and concludes with the proposition that the silence "creates a presumption that their testimony would have been unfavorable to them."

Neither in the Court of Appeals nor in this Court has the Government contested the accuracy of petitioners' statement as to the evidence or lack of evidence adduced by the Government. The facts, showing that the petitioners' behavior was directly contrary to that alleged in the complaint stand unchallenged. They were not challenged below and they are not attacked here.

The conspiracy charged in the complaint and found by the Judicial Officer was based on a uniform trading pattern involving all of respondents before the Secretary, including petitioner Miller: "At all times material to this complaint, the respondents acted collectively and in a uniform manner, pursuant to an understanding or agreement to corner and manipulate the egg market" (App. 19). The Judicial Officer found that the transactions complained of were undertaken "* * * pursuant to an understanding or agreement among the respondents to act collectively and in a uniform manner through respondent Miller and his firm, * * *" (App. 1384). And further "[t]hrough action in concert, the respondents developed this [dominant] position by aggressive and concentrated purchases of December futures, [on December 17-19] by standing for delivery of large quantities of cash eggs, and by temporarily withholding futures and cash eggs from sale, * * *" (App. 1385).

We urged that there was no proof against Miller as to any of those three elements of market behavior which

constitute the uniform manner of trading which was employed by the Government to find the existence of a conspiracy. The Government here does not dispute the fact that Miller's trading pattern was the antithesis of the trading pattern deemed significant. In fact the Government in summarizing the allegations in the complaint omit the reference to the charge that the trading was "in a uniform manner" (Resp. Br. p. 2).

But the Court of Appeals held that the Judicial Officer's conclusions were sustained by a preponderance of the evidence and that the action in concert was disclosed by a long chain of circumstances. The principal charge and major attack against Miller as one of the accused was that he engaged in a uniform trading pattern and it was on this basis that he was included as a participant in a conspiracy. It is undisputed that no proof was offered and no evidence exists in support of that charge. Quite apparently, the circumstances which the Court of Appeals employed to include Miller as a conspirator was his failure to testify.

The Government without any warrant in the record has arbitrarily lumped Miller as a conspirator with all of the accused. References to the accused, including petitioner Miller, are made by the use of the nondescript pronouns "they" and "their". Thus in footnote 3, page 5 of Respondents' brief in opposition it is asserted that the evidence respecting concerted action shows significantly the difference in trading pattern of the accused as compared with all other traders in the market. But petitioner Miller's trading pattern is contrary and in conflict with that of the other accused and compares with the trading of other traders in the market. So also it is urged that concerted action is repeatedly shown by "*their* uniform withholding of eggs from the shorts," but the record is undisputed that this

petitioner aggressively sold all the eggs which he possessed and delivered nine cars into the futures market. Finally, it is alleged that "*they* demanded and received" uniform prices for eggs after the close of trading. The petitioner Miller had no eggs for sale after the close of futures trading. He had sold them all prior thereto. (See statement in Petition for Writ of Certiorari, pp. 5 and 6.)

2. The Government is in error in suggesting that the Court of Appeals did not decide the question whether it had power to modify the order of the Secretary of Agriculture.

The error of the Government's position is patent in light of the order for rehearing. The only question before the Court of Appeals *en banc* was whether that Court could modify the order of the Secretary. The order for rehearing so provided:

> "It Is Ordered, that a rehearing *en banc* shall be held and *said rehearing shall be limited to the question*—Does the Court of Appeals have the power and jurisdiction to change a penalty fixed by respondent Secretary of Agriculture, which penalty is within the statutory limits." (Appendix D, Petition for Certiorari.) (Emphasis added.)

At the oral argument, the Court restricted counsel to this question. And at the oral argument, the Government asserted that the only modification which the Court of Appeals could make was in the form of correcting clerical errors in the Secretary's order. Now that the Court below has erroneously answered the question which was mooted at the rehearing, the Government seeks to evade the effect of the error by suggesting that the Court of Appeals was really deciding something other than the one question which, by its own order, was before it.

The Government seeks to support its argument by reference to an article by one of its counsel which appeared in the George Washington Law Review in January 1958, Campbell, Trading in Futures under the Commodity Exchange Act, 26 George Washington Law Review, 215. Such a self-serving statement is hardly authority for the arguments proposed. It might have been more significant had counsel advised this Court that in interpreting the powers of the Court of Appeals on appeal from an administrative decision under the Commodity Exchange Act, Campbell had acknowledged that:

> "The courts of appeal are vested with jurisdiction to affirm, set aside or modify the administrative determination, ..."

This is the position we advocate here, which we advocated below and which the Court of Appeals rejected.

3. The Government erroneously suggests that the disqualification of Judge Major was not error and if it were error was harmless.

The only reason put forth by the Government as to why retired judges who are assigned to active duty are not to participate in rehearings *en banc* is because they will not be occupied with future cases in which the decision *en banc* will be guiding. We do not have the statistics available to us, but the Court can take judicial notice of the fact that retired Circuit judges have continued to sit for long periods of time after the date of their retirement. Indeed, many of them have carried a calendar no less onerous than some of the judges who have not "retired." Certainly this is true of the Fourth Circuit: we submit that it is also true of the Second and Seventh Circuits. What the Government's argument amounts to is that Circuit judges ought not to participate in rehearings

en banc if they are of an advanced age, since they will not be sitting on a great many cases in the future.

The Government's notion that the disqualification of Judge Major was harmless is based on a grosser error. It assumes that the appellate judicial process is not a deliberative process but merely a casting of ballots, as in an election. If the appellate judicial process is a rational one, in which each of the judges is expected to make available his thoughts to the others about the proper resolution of a case, the erroneous disqualification of a judge from a panel on which he is entitled to sit certainly cannot be said to be "harmless error."

Respectfully submitted.

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